A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Miscellaneous Appeal No.153/2003

Single Bench: **Hon'ble Shri Dilip Raosaheb Deshmukh, J.**

Appellant (Insurer)		National Insurance Co. Ltd. Chowrasiya Complex, Rewa Panna Road, Samaria Chowk Satna, through its Branch Manager, at Branch Office, Bilaspur (Chhattisgarh)
		Versus
Respondents (Driver)	1.	Ramcharan, S/o Rameshwar Patel, aged about 30 years, R/o Village Jhinna, P.S. Ramnagar, Tah. Amarpatan, District Satna (M.P.)
Owner	2.	Sadhulal, S/o Bhagwandin Bais, aged about 48 years, R/o Village Kendwari, P.S. Ramnagar, Tah. Amarpatan, District Satna (M.P.)
Claimants	3.	Banshi Lal, S/o Ganga Prasad, aged about 45 yrs, Caste Satnami,
	4.	Revati Bai, W/o Banshi Lal, aged about 42 years,
		Both residents of Village Sendri, P.S. Koni, Tahsil and District Bilaspur (CG)

Appeal under Section 173 of Motor Vehicle Act.

Present:-

Shri Sanjay K. Agarwal with Shri Sourabh Sharma, counsel for the appellant/Insurance Company.

Smt. Indira Tripathi, counsel for respondents No.1 & 2.

Shri Goutam Khetrapal, counsel for respondents No. 3 & 4.

ORAL ORDER

(Passed on 3rd August, 2007)

In this appeal the appellant/Insurance Company has impugned the award dated 28.11.2002 passed by the IIIrd Additional Motor Accident Claims Tribunal, Bilaspur in claims case No. 06/2002, whereby

compensation of Rs.1,08,000/- was awarded against the appellant/Insurer for accidental death of one Satya Prakash, aged 19 years.

(2) The following facts are not disputed in this appeal:-

A/ That, Satya Prakash aged 19 years died an accidental death due to collision with truck No. M.P. 19/4774 (hereinafter referred to as the "truck") on 20.05.1997 which was being driven by the respondent No.1 namely Ramcharan (hereinafter referred to as the driver) and owned by respondent No.2 Sadhulal (hereinafter referred to as the owner).

B/ That before the accident, the truck was transferred by the owner in favour of one Ramlal Baiswar.

C/ That, the truck was insured under a valid policy insurance by the appellant/Insurer on the date of the accident.

(3) The respondents No. 3 and 4 being the parents of the deceased, filed an application under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act') for compensation against the owner, driver and insured and pleaded that at about 1.A.M. while Satya Prakash, aged 19 years was assisting the replacement of the punctured wheel of a tractor on the main road at Village Sendri, the driver drove the truck in a rash and negligent manner and crushed Satya Prakash underneath resulting in his death.

(4) The appellant/Insurer pleaded that the driver of the offending truck did not possess a valid driving licence at the time of accident and that the owner of the truck had transferred the ownership of the truck in favour of one Ramlal Baiswar before the accident, without giving any intimation to the appellant/insurer. The appellant/Insurer thus prayed before the M.A.C.T that there was a fundamental breach of policy condition and liability to pay compensation could not be fastened on it.

(5) The driver and owner of the truck filed a joint written statement and pleaded that the driver of the truck had a valid driving licence and since the truck was insured by the appellant on the date of accident, the insurer was liable to pay compensation. After filing written statement, the driver and owner not only remained *ex parte* but also did not enter the witness box before the M.A.C.T.

(6) The M.A.C.T. recorded a finding that Satya Prakash died as a result of rash and negligent driving by the driver of the truck. It further recorded a finding that the appellant/insurer could not escape liability to pay compensation merely on the ground that the truck was transferred by its owner before the accident without intimation to the appellant/Insurer. It further held that it could not be said that the owner of the truck had not used due diligence in allowing the vehicle to be driven by the respondent No.1, i.e. a duly licenced driver, and therefore, fastened the liability on the insurance company to pay compensation of Rs.1,08,000/-.

(7) Shri Sanjay K. Agarwal, learned counsel for the appellant/Insurance Company has urged the following two points in this appeal.

A/ that, upon transfer of the truck before the date of accident by its owner, it was the duty of the owner to send intimation to the appellant/insurance company regarding the transfer, failing which the appellant/insurance company was not liable to pay compensation.

B/ it was urged that the insurance company had discharged the initial burden by proving the certificate issued by the Regional Transport Officer issued after due verification that the licence number pertained to a motor cycle and was issued in the name of one Rajendra Prasad. It was also urged that by further examining the Assistant Administrative Officer of the Insurance Company and by proving the certificate issued by the licensing authority as also the report of the authorized Investigator of the insurer, the initial burden was discharged by the Insurance Company and it was for the owner of the vehicle to lead evidence to show that he had used due diligence and taken all precautions to see that the truck was driven by a duly licenced driver at the time of the accident.

Reliance was placed on *National Insurance Co. Ltd.* Vs *Swaran Singh and others* - 2004 AIR SCW 663, National Insurance Co. Ltd. *Vs. Kusum Rai and Others* – 2006 (2) T.A.C. 1 (S.C.), *Lal Chand* Vs. *Oriental Insurance Co. Ltd.* (2006) 7 Supreme Court Cases 318, *National Insurance Co. Ltd.* Vs. *Laxmi Narain Dhut*, 2007 AIR SCW 2279 and *United India Insurance Co. Ltd, Shimla* Vs. *Tilak Singh and Others*, (2006) 4 Supreme Court Cases 404 while arguing that the liability to pay compensation ought not to be fastened on the insurer who should be given the right to recover compensation paid by it from the owner.

(8) On the other hand, Smt. Indira Tripathi, learned counsel appearing for the owner placed reliance on **Swaran Singh's** case (supra) and contended that the appellant/Insurer did not discharge its burden of proving that the insured had failed to exercise reasonable care in the matter of fulfilling the condition of the policy of insurance regarding use of vehicle either by a duly licenced driver or by one who was not disqualified to drive at the relevant time. Reliance was placed on *Vijay Prakash Tiwari* Vs. *Smt. Satya Bhama Devi and others,* 2007 (3) M.P.H.T. 65 (DB) in support of the contention that since the initial burden which was on the insurance Company was not discharged, the M.A.C.T. had rightly fastened the liability on the appellant/Insurer to pay compensation. Shri Goutam Khetrapal, learned counsel appearing for the claimants argued in support of the impugned award.

(9) Having considered the rival submissions, I have perused the record. So far as the first contention urged by the learned counsel for the appellant/insurer is concerned, Section 157 of the Act reads as under:-

157. Transfer of certificate of insurance.-(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

[Explanation.- For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance.

(10) In ***Union of India Insurance Co. Ltd. Shimla*** **vs.** ***Tilak Singh and others,*** **(2006) 4 SCC 404, while considering the provisions of Section 103-A of the Motor Vehicles Act, 1939 (henceforth, the Act, 1939) and the corresponding provision contained in Section 157 of the Act, 1988 with reference to the liability of the insurance-Company vis-à-vis the deceased-third party, the Apex Court had observed as under:**

"9. Citing with approval the judgment of the Full Bench of the Andhra Pradesh High Court in *Madineni*

Kondaiah v. *Yaseen Fatima (AIR 1986 AP 62)* and contrasting the provisions of Section 103-A of the 1939 Act with Section 157 of the 1988 Act, this Court said in *Complete Insulations (P) Ltd.* v. *New India Assurance Co. Ltd. [(1996) 1 SCC 221]* (vide SCC p. 225, para 6):

> "*6.* Now, under the old Act although the insurer could refuse to transfer the certificate of insurance in certain circumstances and the transfer was not automatic as under the new Act, there was under the old law protection to third parties, that is, victims of the accident. The protection was available by virtue of Section 94 and 95 of the old Act."

10. the judgment of the Andhra Pradesh High Court in *Kondaiah* was specifically referred to and affirmed in the subsequent judgment of this Court in *New India Assurance Co. Ltd.* v. *Sheela Rani [(1998) 6 SCC 599]* where this Court observed after referring to the judgment in *Complete Insulations* as follows: (vide SCC p. 604, para 10):

> "A careful reading of the judgment of this, extracted as above, will clearly show that on the transfer of the vehicle about which intimation was given though not strictly as required under Section 103-A of the Act and in the absence of refusal from the insurer, the policy already given by the Insurance Company to the transferor will not lapse."

11. In *G. Govindan* v. *New India Assurance Co. Ltd. [(1999)3 SCC 754]* this Court had occasion to refer to the decisions of the Full bench of the Andhra Pradesh High Court in *Kondaiah case, Complete Insulations Ltd.* and *New India Assurance Co. Ltd. v. Sheela Rani* in the context of the 1988 Act and, after contrasting it with the provisions of the 1939 Act, held (vide SCC p. 761, para 13):

> "*13.* In our opinion, both under the old Act and under the new Act the legislature was anxious to protect

the third-party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts."

12. In *Rikhi Ram* v. *Sukhrania [(2003) 3 SCC 97]* a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in *G. Govindan case* and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interest of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different."

(11) It is thus clear that under Section 157 of the Act, even though intimation of the transfer of the vehicle was not given to the insurance company, the certificate issued and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of transfer. In other words, under the deeming provision contained in the sub-clause (1) of Section 157, the appellant/Insurer cannot escape its liability to pay

compensation towards the deceased third party on the ground that the owner of the vehicle had not given intimation of the transfer of the vehicle.

(12) So far as the second contention of the learned counsel for the appellant is concerned, in **Swaran Sing's** case (supra), the apex Court while summarizing its findings held as under:-

> **Summary of findings**:-
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> Xxxxxxxx xxxxxxxxxxxxx xxxxxxxx
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> (iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licenced driver or one who was not disqualified to drive at the relevant time.
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> (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.
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> (v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same

would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(13) It is thus clear that in order to avoid its liability towards insured, the initial burden lies on the insurer to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licenced driver or one who was not disqualified to drive at the relevant time. In my considered opinion, the only manner in which the appellant/Insurance company can discharge its initial burden is by proving the certificate issued by the licensing authority regarding the licence being fake and by proving the report of the investigator. In the present case, the appellant/Insurer had not only proved the report of the investigator Ex. A-2

but also the certificate issued by the licensing authority Ex.A-3, which clearly proved that the licence number shown in the licence produced before the M.A.C.T. was in fact a licence to drive a motor cycle and was issued in the name of one Rajendra Prasad. Since the owner and the driver of the vehicle remained *ex parte* after filing written statement and neither cross-examined the Assistant Administrative Officer of the Insurance Company nor entered the witness box, it cannot be said that the authenticity of the certificate issued by the licensing authority or the report of the investigator is under any doubt. If the driver/owner of the vehicle had participated in the proceedings, cross-examined the Assistant Administrative Officer of the Insurance Company or had led any evidence, perhaps it could have been said that the licensing authority or the investigator ought to have been examined by the insurance company in support of its case. But, in the facts and circumstances of this case, the situation is quite different. Both the owner and driver of the truck did not participate in the proceedings after filing of a joint written statement and remained *ex parte.* Even in the written statement, nothing was pleaded to show that the owner had, before entrusting the vehicle to the driver, used due diligence and had taken sufficient care to satisfy that the driver of the vehicle possessed valid driving licence. A bare perusal of the copy of the driving licence arouses suspicion about the authenticity of the licence as it is a second duplicate driving licence issued in the name of one Ramcharan Patel. By merely looking at the licence, any person of reasonable prudence would have a serious doubt that the licence was fake.

(14) In **Laxminarain Dhut's** case (supra) the apex Court has held that once the initial burden which lies on the insurer to show that the licence is fake is satisfied, the natural consequences will flow thereupon. In **Lalchand's** case (supra), relied on by the learned counsel for the owner, the facts were that the appellant/owner had entered the witness box and had deposed that he had employed the driver after checking his driving licence, after taking his driving test and after satisfying that the driver was fully competent and conversant with driving. Under these circumstances, it was held that the insurance company had failed to prove that the owner of the vehicle was in no manner guilty of negligence and had failed to exercise reasonable care in the matter of fulfilling the condition of the policy.

(15) The present case is clearly distinguishable. The initial burden which lay upon the insurance company to prove that the driver of the offending vehicle did not possess a valid driving licence having been discharged, it was for the owner of the vehicle to show either by cross-examining the witness of the insurance company or by leading his own evidence to show how he had used due diligence or taken care to see that the driver of the vehicle possessed a valid driving licence or that he had taken care to verify that the second duplicate licence possessed by the driver of the truck was not fake. I am of the considered opinion that the appellant/Insurance company has discharged its initial burden by proving that the driver of the truck did not possess a valid driving licence at the time of the accident and in fact the licence produced before the M.A.C.T. was a fake licence. In the absence of any material having been produced by the owner of the vehicle before the M.A.C.T. as in **Lalchand's** case

(supra) to show due diligence or reasonable care to ensure that the driver of the truck possessed a valid driving licence, I am of the considered opinion that the insurance company has satisfactorily established a fundamental breach of the policy condition that the driver of truck did not possess a valid licence. Placing reliance on the dictum in **Swaran Singh** (supra) as also **Kusum Rai & Others** (supra), the insurance company is not liable to pay compensation since it has satisfactorily established a fundamental breach of policy condition by the insured. However, in the present case the owner of the truck had remained *ex parte* and under the policy of insurance the insurance company was statutorily liable to pay compensation. The claimants are from a poor background. They must have suffered great mental agony. It is a fit case in which the appellant/Insurance company is directed to first pay the compensation and be given the right to recover it from the owner of the vehicle.

(16) In the result, the appeal is partly allowed. The impugned award is modified and it is held that the appellant/Insurer is not liable to pay compensation in view of the fundamental breach of policy condition regarding use of the truck by a duly licenced driver. In the facts and circumstances of the case, the appellant/insurer shall deposit the entire remaining compensation within a period of 30 days from today in the M.A.C.T and may recover the compensation deposited by it from the owner by filing execution proceedings before the concerned M.A.C.T. There shall be no order as to costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Priya